Sup Court, U.S.
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No. _____

In The
Supreme Court of The United States
October Term 1997

CHERYL D. CHRISTOPHER,
Petitioner,

v.

ADAM'S MARK HOTELS,
a Division of HBF Corporation
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Cheryl D. Christopher filed her Notice of Appeal from the United States District Court for the Western District of Missouri after the court granted Adam's Mark Hotel summary judgment.

The United States Court of Appeal for the Eighth Circuit affirmed the lower court's decision stating that while Ms. Christopher had made a prima facia case of disability discrimination under the Americans with Disabilities Act, she had failed to adduce sufficient evidence for a reasonable trier of fact to infer discrimination even though a factual dispute as to the issue of pretext existed.

What is the proper standard for summary judgment where a disability discrimination plaintiff has made a prima facia case, and where a factual dispute exists involving pretext?

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PETITION FOR WRIT OF CERTIORARI

Cheryl D. Christopher respectfully prays that a wr of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on March 5, 1998, in order to resolve the conflict between the Eighth and the six other circuits on the important issue presented herein.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit that gives rise to this petition is that court's decision of March 5, 1998, published at 137 F.2d 1069. It is reproduced in Appendix A hereto ("App A") at page A- 1.

JURISDICTION

On June 4, 1997, United States Magistrate Judge Sarah M. Hays of the U.S. District Court for the Western District of Missouri, entered her order granting Adam's Mark Hotel summary judgment. It is reproduced in Appendix B

hereto ("App B") at B-1 Christopher filed a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit on June 25, 1997. On March 5, 1998, the Eighth Circuit affirmed the order of Judge Hays. Pursuant to Supreme Court Rule 13. 1, this petition has been filed within 90 days of that decision.

STATUTES INVOLVED IN THE CASE

42 U.S.C. §12112(a) No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. Federal Rules of Civil Procedure 56 (b) and (c), as amended in 1987:

> (b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move

with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

On Wednesday, May 10, 1995, the Petitioner, Cheryl D. Christopher applied for a position with Respondent Adam's Mark Hotel, as a sales secretary. Following interviews with various members of management, Ms. Christopher was hired. She reported to work the next day and attended a company orientation meeting. In that meeting, she was asked to complete a Supplemental Information Form. Among other things, the form inquired about Christopher's medical condition and history. Ms. Christopher responded truthfully and wrote down that she had experienced bipolar breakdowns in the past and, further, had been hospitalized several times since the age of 17 for bipolar dysfunction. She turned the form into Respondent's Director of Human Resources, and it was placed in her personnel file.

Following the orientation session, Ms. Christopher began training on her job responsibilities. This training

consisted of working side-by-side with the departing sales secretary. The training was conducted on Friday, May 12, and continued into Monday and Tuesday, May 15-16.

Ms. Christopher had an advanced degree in Computer Science and had taught the WordPerfect word processing system at the college level. However, she had not used her WordPerfect skills recently and admitted to her trainer at Adam's Mark that she was not familiar with certain function keys associated with the WordPerfect system. Nevertheless, during her period of employment with Respondent, Ms. Christopher was able to satisfactorily produce all correspondence given to her to type. The only tasks that she was unable to immediately perform were the production of a banner and the use of the "merge" function. Additionally, she was not told by anyone, prior to the afternoon of May 17, of any dissatisfaction with her work.

Instead, her trainer noticed "something strange" about

Ms. Christopher's demeanor and felt she was somewhat defensive. Ms. Christopher's supervisor alleged she also worked side-by-side with Petitioner, which Ms. Christopher denies, and discovered what the supervisor believed to be a defensive attitude and lack of basic word processing skills. As a result, the supervisor reviewed Ms. Christopher's personnel file, which contained the Supplemental Information Form. The supervisor requested that the Human Resources Department telephonically confirm Christopher's education and job experience. This was done and the listed items were confirmed.

Nevertheless, the supervisor decided to terminate Ms. Christopher's employment after only three days on the job. In contrast, Respondent previously had employees (particularly sales secretaries) that experienced performance and attendance problems. In those case, remedial training was provided and a period of time was allowed for performance improvement.

In several cases, sales secretaries were hired who had little or no experience with WordPerfect, and were allowed to learn the program on the job. Coincidentally, none of these sales secretaries had any known disabilities.

The same was not the case with Petitioner. She was given no opportunity to address her perceived failings and weaknesses. Instead, her supervisor recommended to Respondent's Director of Human Relations, that she be terminated. Thereafter, on May 17, Respondent's Director of Human Relations met with Petitioner and terminated her employment. The reasons given to Ms. Christopher for her termination were that she lacked solid computer skills, she was unable to understand basic office routing procedures and the she did not seem to accept established guidelines for paperwork. Further, it was noted in Ms. Christopher's personnel file that she was not eligible for rehiring.

One month later, Ms. Christopher filed a Charge of

Discrimination with the Equal Employment Opportunity Commission alleging that she had been subjected to illegal discrimination in violation of the Americans with Disabilities Act; and that the reasons given for her termination were not the real reasons. Instead, she alleged, she was terminated due to Respondent's discovery and fear of her mental disability.

Following receipt of a Notice to Sue letter, Ms. Christopher filed a Complaint against Respondent in the United States District Court for the Western District of Missouri. Honorable Sarah W. Hays, United States Magistrate, sustained Respondent's Motion for Summary Judgment on June 3, 1997. The basis of her decision was that, while Petitioner proved her prima facia case, she failed to prove that Respondent's non-discriminatory legitimate business reasons for her termination were pretextual.

Petitioner filed her Notice of Appeal to the United States Court of Appeals for the Eighth Circuit on June 25,

1997. The Eighth Circuit, relying on Rothmeier v. Investment Advisers, Inc. 85 F.3d 1328 (8th Cir. 1996), affirmed Judge Hays' decision on March 5, 1998, holding that Ms. Christopher had failed to create a submissible case as to pretext.

REASONS FOR GRANTING THE WRIT

I. A split of opinion exists between the Eighth Circuit and, at least, six other circuits concerning the standard for summary judgment in a discrimination case involving pretext.

In the instant matter, the Eighth Circuit affirmed thegranting of summary judgment by the District Court to the Respondent. The Appellate Court based its opinion on thestandard set out in Rothmeier v. Investment Advisors, Inc., 85 F.3d 1328 (8th Cir. 1996). That case interpreted thiscourt's decision in St. Mary's Honor Center v. Hicks, 509U.S. 502, 113, S.Ct. 2742, 125 L.Fd. 2d. 407 (1993), tomean that the burden-shifting scheme established in McDonnell Douglas Corp. v. Green 411 U.S. 792, 93 S.Ct.1817, 36 L.Fd. 2d 668 (1973), mandated that even though aplaintiff may be able to prove a prima facia case ofdiscrimination, once the employer tenders a defense oflegitimate non-discriminatory business reasons, the plaintiff

must produce "sufficient evidence for a jury to disbelieve the reasons proffered by the employer. . ." Rothmeier, 1335. The Eighth Circuit, therefore, allowed the lower court judge "to decide on a motion for summary judgment that the evidence is insufficient for a reasonable trier of fact to infer discrimination even though the plaintiff may have created a factual dispute as to the issue of pretext." Id., 1335. As a result, the trial court judge was allowed to weigh the credibility of witnesses and to decide what inferences are reasonable or unreasonable. Essentially, the trial judge became the finder of fact in place of the jury.

In contrast, a majority of the Circuits have adopted a different standard, which if applied to the facts of the instant case, could well have produced a different result. The D.C. Circuit has cautioned that "because employment discrimination claims center on the issue of an employer's intent, . . . an added measure of rigor . . . or caution . . . is appropriate in

[ruling on] summary judgment. . . ." Aka v Washington Hospital Center, 116 F.3d 876, 877 (D.C. Cir.1997). That court continued its analysis by setting out its standard:

> ". . . the fact finder's disbelief of the reasons putforward by the defendant (particularly if the disbelief is accompanied by a suspicion of mendacity) may, together with the elements of theprima facia case, suffice to show intentional discrimination."

Id.,880. The focus of the D.C. Circuit is that the court should not substitute its view of the parties' competing evidence for that of the jury when the employer's proffered business reasons are suspect. "[C]ourts . . . must bear in mind that a fact finder could infer intentional discrimination even in the absence of crystal-clear documentary evidence filed at the summary judgment stage."Id., 880.

Other circuits have adopted similar standards:

3rd Circuit:

Krouse v. American Sterilzer, Inc.,

126 F.3d 494 (3rd Cir. 1997)

Stewart v. Rutgers,

120 F.3d 426 (3rd Cir. 1997)

Sheridan v. E.I. DuPont de Nemouis and Co.,

100 F. 3d 1061 (3rd Cir. 1996)

4th Circuit:

Bums v. AAF-McQuary, Inc.,

96 F.3d 728 (4th Cir. 1996)

Runnebaum v. Nations Bank of Maryland,

95 F.3d 1285 (4th Cir. 1996)

7th Circuit:

O'Connor v. DePaul University,

123 F.3d 665 (7th Cir. 1997)

9th Circuit:

Schnidrig v. Columbia Machine, Inc.,

80 F.3d 1406 (9th Cir. 1996)

Warren v. City of Carlsbad,

58 F.3d 439 (9th Cir. 1995)

10th Circuit:

Randle v. City of Aurora,

69 F.3d 441 (10th Cir. 1995).

11th Circuit:

Jameson v. Arrow Co.,

75 F.3d 1528 (11th Cir. 1996)

As a significant split exists between the circuits the standards for summary judgment that flow from St. Mary's Honor Center v. Hicks, a grant of a writ of certiorari is not only appropriate, but necessary.

CONCLUSION

For the forgoing reasons, the petition for writ ofcertiorari should be granted.

Respecfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 97-2842

Cheryl D. Christopher,	*
Appellant,	*
	* Appeal from the United States
v.	* District Court from the
	* Western District of Missouri.
Adam's Mark Hotels,	*
a division of HBE	*
Corporation,	*
Appellee.	*

Submitted: January 13, 1998
Filed: March 5, 1998

Before BOWMAN, MORRIS S. ARNOLD, Circuit Judges, and JONES,[1] District Judge.

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[1]The Honorable John B. Jones, United States District Judge for the District of South Dakota, sitting by designation.

BOWMAN, Circuit Judge.

Cheryl Christopher sued Adam's Mark Hotels seeking damages for employment discrimination in violation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12102-12213 (1994 & Supp. I 1995), and for intentional and negligent infliction of emotional distress under Missouri state law. Adam's Mark moved forsummary judgment, and the District Court[2] granted the motion. Christopher now appeals. We find no error and affirm the judgment.

I.

We must view the record in the light most favorable to Christopher, the nonmoving party, and give her the benefit of all reasonable inferences. See Miller v. National Cas. Co., 61 F.3d 627, 628 (8th Cir. 1995). Christopher applied for a

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[2]The Honorable Sarah W. Hays, United States Magistrate Judge for the Western District of Missouri.

sales secretary position at Adam's Mark in Kansas City, Missouri on May 10, 1995. She submitted a resume and employment application indicating that she possessed a Master's Degree in Computer Science, that she was highly skilled and experienced in the use of WordPerfect (the word processing program utilized at Adam's Mark), and that she had taught WordPerfect at the college level. Christopher was interviewed the same day she applied but did not identify herself as an individual with a disability at the time. She was hired that day for the position.

Christopher reported for work the next day, May 11, 1995. Christopher took part in Adam's Mark's orientation program, at which she was asked to complete several forms. One was a Supplemental Information Form, which contained questions about medical condition and history. In response, Christopher wrote that she had experienced a bipolar breakdown and that she had been hospitalized for bipolar

dysfunction. The supplemental form was placed in Christopher's personnel file in accordance with company procedures.

After orientation, Christopher reported to the sales department where she began on-the-job training with Lisa Lambertson, the sales secretary Christopher was to replace. The training was to consist of Lambertson working side-by-side with Christopher. On this first day in the sales office, Christopher admitted to Lambertson that she was not familiar with the WordPerfect function keys. When asked to execute a merge and set up a banner using WordPerfect, Christopher indicated she did not know how to perform these tasks. Christopher struggled with locating and opening documents, saving documents, and closing documents. At one point during Christopher's training, Ann Windsor, Christopher's immediate supervisor, pulled up a blank form for Christopher to work on. Christopher told Windsor that the form was

difficult to use and that one of her first priorities would be to change the office system. Christopher admited in her depostition that she acted combatively during her brief employment at Adam's Mark. Prior to her termination, however, no one told Christopher that she was having performance problems.

Just a few days after Christopher's employment began, Windsor recommended that Christopher be terminated. Sometime after Christopher's orientation but before her termination, Windsor reviewed Christopher's personnel file. Based upon Windsor's recommendation, Don Russell, Director of Human Resources, agreed that Christopher should be terminated. It was Russell's practice to review employees' files prior to terminating them. On May 17, 1995, Russell terminated Christopher.

II.

We review de novo a decision to grant summary

judgment. See Hase v. Missouri Div. of Employment Sec., 972 F.2d 893, 895 (8th Cir. 1992), cert. denied, 508 U.S. 906 (1993). Summary judgment is appropriate when the movant establishes "that there are no material facts in [genuine] dispute and that, as a matter of law, the movant is entitled to judgment." Oldham v. West, 47 F.3d 985, 988 (8th Cir. 1995). We proceed with caution when deciding whether summary judgment is appropriate inemployment discrimination cases because intent is usually a central issue. See Gill v. Reorganized Sch. Dist. R-6, Festus, Mo., 32 F.3d 376, 378 (8th Cir. 1994). This cautionary approach, however, "cannot and should not be construed to exempt" from summary judgment employment discrimination cases involving intent. Krenik v. County of Le Sueur, 47 F.3d 953, 959 (8th Cir. 1995). If there is no genuine issue about the employer's discriminatory intent, to the extent intent is material, then summary judgment may be appropriate.

The ADA prohibits employers from discriminating "against a qualified individual with a disability because of [that] disability." 42 U.S.C. § 12112(a). A qualified individual with a disability is a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position." Id. § 12111(8).

To establish a claim of intentional discrimination under the ADA, we employ the burden-shifting scheme set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804 (1973). See Aucutt v. Six Flags Over Mid-Am., Inc., 85 F.3d 1311, 1318 (8th Cir. 1996). First, the plaintiff must establish a prima facie case of discrimination. See McDonnell Douglas, 411 U.S. at 802. To establish a prima facie case under the ADA, a plaintiff "must show that she is disabled within the meaning of the Act; [that] she is qualified to perform the essential functions of her job with or without

reasonable accommodation; and [that] she suffered an adverse employment action because of her disability." Webb v. Mercy Hosp., 102 F.3d 958, 959-60 (8th Cir. 1996). After a plaintiff establishes a prima facie case, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions. See McDonnell Douglas, 411 U.S. at 802. Then, in order to prevail, the plaintiff must show that the employer's stated reason was in fact pretextual. See id. at 804. This requires proof that the employer's articulated reason for the adverse employment action was false and that discrimination was the real reason. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993).

Viewing the facts in the light most favorable to Christopher, and for purposes of this appeal, we do not quarrel with the District Court's conclusion that she established a prima facie case of discrimination under the ADA. As to the first element, whether Christopher is

"disabled," the parties argue whether her bipolar disorder meets the definition under the ADA. See 42 U.S.C. § 12102(2) (defining disability). We have in the past, however, assumed without deciding that bipolar disorder constitutes a disability sufficient to make out a prima facie case. See Birchem v. Knights of Columbus, 116 F.3d 310, 313-14 (8th Cir. 1997). As to the second and third elements, whether Christopher was qualified to perform the essential functions of the job and whether Christopher suffered adverse employment action because of her disability, Christopher contends that she was qualified to perform the secretarial job and that Adam's Mark terminated her employment due to her bipolar disorder. Like the District Court, we will assume that Christopher has established the elements required to make out a prima facie case of discrimination.

Adam's Mark, however, is able to satisfy its burden in the next step of our inquiry by articulating legitimate,

nondiscriminatory reasons for Christopher's termination. Adam's Mark asserts that Windsor believed that Christopher lacked the skills she represented on her resume; that Christopher was unable or unwilling to learn the duties of her job; and that Christopher was combative, resentful, and resistant towards her supervisors and co-workers. Adam's Mark thus has rebutted the presumption of discrimination raised by Christopher's prima facie case.

The burden shifts back to Christopher to show that Adam's Mark's articulated reasons are a pretext for discrimination. As evidence of pretext, Christopher first alleges that Windsor admitted it normally takes three weeks to train a new secretary, but that Christopher had worked for less than one week when she was terminated. The record shows, however, that Windsor actually said it may take up to three weeks to understand the company's terminology and routing procedures, but that new secretaries are expected to be

proficient in word processing skills when they start work. Windsortestified that she felt Christopher "had misrepresented her skill level to the point that [Christopher] was unable to do the job." Windsor Dep. at 62-63. Christopher also had admitted that she was not familiar with the basic word processing function keys, and Lambertson had observed Christopher's difficulties opening, saving, and closing documents.

Christopher next alleges that previous sales secretaries began the same job with less experience than she had, and Adam's Mark therefore afforded them more training. She contends she should have been offered additional training, notwithstanding her experience. The evidence shows, however, that Christopher received the same training as did the previous secretaries--the secretary whom Christopher was to replace, Lambertson, sat at Christopher's side and gave her computer instruction. This was exactly how Lambertson had

been trained. Moreover, Lambertson testified that she told Christopher that WordPerfect tutorials and computer manuals were available for her use and that she reminded Christopher there was a template above the function keys explaining their usage.

Christopher next contends that Adam's Mark had worked with and given additional time to other secretaries with performance problems in an attempt to salvage their employment. Russell did acknowledge that Adam's Mark had worked with one secretary in the sales department who had exhibited performance problems. Russell went on to testify, however, that the secretary's performance problem was more one of routing paperwork than a deficiency in technical word processing skills. Russell also added that, unlike Christopher, the secretary showed a commitment to learn, improve, develop, and progress.

Finally, as evidence of pretext Christopher points to

the fact that Windsor examined Christopher's personnel file within the first few days of her employment and that the disclosure of her disability was contained therein. Apparently Windsor requested Christopher's file because she was questioning Christopher's computer skills. Even if we assume arguendo that Windsor did become aware of Christopher's disability when she looked in the file, Christopher has failed to point to any evidence that her termination was a result of Windsor's discovery. Mere knowledge of a disability cannot be sufficient to show pretext; otherwise, summary judgment for an employer would be appropriate only in cases where the employer is completely unaware of the plaintiff's disability. Because knowledge of the plaintiff's disability is an essential element of an ADA employment discrimination claim of the sort brought here, see 42 U.S.C. § 12112, a plaintiff who could prove such knowledge would have ipso facto a submissible case of pretext. This defies logic and cannot be

what Congress intended.

Christopher argues that in granting summary judgment the District Court did not apply the correct standard. We disagree. "[A] trial judge [is allowed] to decide on a motion for summary judgment that the evidence is insufficient for a reasonable trier of fact to infer discrimination even though the plaintiff may have created a factual dispute as to the issue of pretext." Rothmeier v. Investment Advisors, Inc., 85 F.3d 1328, 1335 (8th Cir. 1996). Here, the District Court correctly applied the Rothmeier standard and determined that Christopher had failed to create a submissible case as to pretext. We agree with the District Court that Christopher's evidence is insufficient for a reasonable trier of fact to infer discrimination. We therefore affirm the order of the District Court granting summary judgment to Adam's Mark.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

CHERYL D. CHRISTOPHER, Plaintiff,	)	
	)	Case No.
v.	)	96-0009-CV-W-5-BD
ADAM'S MARK HOTELS, Defendant.	)	

ORDER

Plaintiff Cheryl D. Christopher filed suit on January 3, 1996, against her former employer Adam's Mark Hotels seeking damages for discrimination in employment in violation of the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101, et seq. (Count I), intentional infliction of emotional distress (Count II) and negligent infliction of emotional distress (Count III). The parties have consented

to proceed before the undersigned Magistrate Judge for all proceedings in this case.

On February 7, 1997, defendant filed a Motion for Summary Judgment. Defendant sets forth five arguments as to why it is entitled to summary judgment on Count I of plaintiff's Complaint: (1) plaintiff's Complaint was not timely filed within ninety days of receipt of a notice of right to sue from the Equal Employment Opportunity Commission; (2) the decision makers were unaware of plaintiff's alleged disabilities when the discharge decision was made; (3) plaintiff cannot establish a prima facie case of disability discrimination; (4) plaintiff was discharged for valid, nondiscriminatory reasons; and (5) plaintiff failed to mitigate her damages by taking her medication as prescribed. Defendant further states that it is entitled to summary judgment on Count II since there is no evidence of extreme and outrageous conduct by defendant. Finally, defendant

states that it is entitled to summary judgment on Count III because plaintiff's admitted failure to take her medication as prescribed was an unforeseeable, superseding negligent act which resulted in plaintiff's mental breakdown.

I. STANDARDS FOR EVALUATING A MOTION FOR SUMMARY JUDGMENT

Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is appropriate when the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The moving party has the initial burden of showing that there is an absence of evidence to support the nonmoving party's case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact. "(A] party opposing a properly supported motion for summary judgment may not rest on

mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

The Court must review the facts in a light most favorable to the party opposing the motion for summary judgment and give that party the benefit of any inferences that logically can be drawn from those facts. *See Lane v. Ground Round, Inc.*, 775 F. Supp. 1219, 1221 (E.D. Mo. 1991). The Court is required to resolve all conflicts of evidence in favor of the nonmoving party. *Id. See also Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d. 264, 269 (8th Cir.1993) ("At the summary judgment stage, we resolve all disputed facts and draw all inferences in favor of the plaintiff.")

Finally, the Eighth Circuit Court of Appeals has cautioned that summary judgment should seldom be used in employment discrimination cases. *See Crawford v. Runyon*, 37 F.3d 1338, 1341 (8thCir. 1994). The *Crawford* court

further stated:

> Summary judgment is appropriate only in "those rare instances where there is no dispute of fact and where there exists only one conclusion." Because discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant.

Id. (citations omitted).

II. UNCONTROVERTED FACTS

Defendant and plaintiff agree that the following facts are uncontroverted for purposes of defendant's Motion:

1. Since the age of nineteen, plaintiff has experienced several breakdowns, the most recent occurring in October 1996. (Undisputed Portion of

Defendant's Fact 13)

2. In March 1995, plaintiff had a breakdown and was hospitalized for five days. (Undisputed Portion of Defendant's Fact 12)

3. Plaintiff applied for a position as a secretary with Adam's Mark on or about May 10, 1995. (Defendant's Fact 11)

4. On May 10, 1995, plaintiff submitted a resume and employment application to Adam's Mark. Plaintiff's resume indicated that she had taught courses at National College, including WordPerfect. (Undisputed Portion of Defendant's Fact 14; Plaintiff's Fact 14)

5. Plaintiff was interviewed for a position in the sales department at Adam's Mark. She was interviewed by Don Russell, Director of Human Resources, Ann Windsor, Sales Department Manager,

and Carol Howitt, Director of Sales. (Undisputed Portion of Defendant's Fact 15)

6. Plaintiff did not identify herself as an individual with a disability at any time during her interviews with Don Russell, Ann Windsor or Carol Howitt. (Defendant's Fact 16)

7. Plaintiff never requested any accommodation of her alleged disabilities by Adam's Mark at any time before, during or after her employment by Adam's Mark. (Defendant's Fact 110)

8. After accepting the position as sales secretary for defendant, plaintiff attended the company-sponsored orientation program on Thursday, May 11, 1995. Plaintiff began her employment in the sales office as the secretary on Friday, May 12, 1995. (Plaintiff's Fact 148)

9. During the orientation, defendant requested

that new employees complete a Supplemental Information Form. Plaintiff complied with defendant's request by completing the Supplemental Information Form and returning it directly to Don Russell. (Plaintiff's Fact 149)

10. Plaintiff disclosed on the Supplemental Information Form that she has had a bipolar breakdown and has been hospitalized for bipolar disfunction since the age of seventeen. (Plaintiff's Fact 150)

11. At the conclusion of orientation, the Supplemental Information Forms are given to the personnel secretary, who reviews them for completion and signatures. The Supplemental Information Form is then placed in the employee's personnel file to which supervisors have access. (Plaintiff's Fact 151)

12. Defendant's Supplemental Information Form

is no longer used in defendant's orientation program. (Plaintiff's Fact 170)

13. Patricia Burns was a secretary in the sales office for two and one-half years. Prior to becoming a sales secretary, Burns had no prior secretarial experience and no prior WordPerfect experience. (Plaintiff's Fact 154)

14. Lisa Lambertson worked for one year as a secretary in the sales off ice for defendants. Lambertson had approximately four weeks of secretarial and WordPerfect experience prior to obtaining employment with defendant as a sales secretary. Lambertson received one-on-one training from Ann Windsor and received a tutorial to assist in her training. Two other secretaries in the sales office commenced work as a sales secretary with less experience than Lambertson. (Undisputed Portion of

Plaintiff's Fact 155)

15. Plaintiff admitted on her first day in the sales office that she was not familiar with certain function keys of WordPerfect. Plaintiff did not actually work on the computer until her second day in the sales office. Plaintiff did not have the opportunity to review the tutorial which had been provided to Lambertson. Plaintiff satisfactorily produced correspondence during her employment as sales secretary. (Plaintiff's Fact 156)

16. Although her desk was within hearing distance of plaintiff's desk, Ann Windsor never provided one-on-one training to plaintiff. During her brief employment with defendant, plaintiff was able to complete only a minimal amount of work. (Plaintiff's Fact 157)

17. During plaintiff's employment with defendant,

no one notified plaintiff that she was having performance problems or expressed displeasure with her abilities in any way. Plaintiff recalls only two questions regarding word processing being asked that she was unable to answer without reviewing the commands. (Plaintiff's Fact 158)

18. During her employment at Adam's Mark, plaintiff was asked to perform a merge and prepare a banner using WordPerfect. When asked to perform these two tasks, plaintiff indicated she did not know how to perform these tasks. (Undisputed Portion of Defendant's Fact 118)

19. Plaintiff never heard any employee of Adam's Mark ever mention or discuss in any way her alleged disabilities at any time before or during her employment at Adam's Mark. (Defendant's Fact 126)

20. Ann Windsor, plaintiff's immediate

supervisor, made the initial decision that plaintiff should be terminated. (Undisputed Portion of Defendant"s Fact 119)

21. On Wednesday, May 17, 1995, Ann Windsor recommended to Don Russell that plaintiff be terminated. Prior to making the termination recommendation to Don Russell, Ann Windsor recommended to Carol Howitt that plaintiff be terminated. Howitt approved Windsor's recommendation. (Plaintiff's Fact 161)

22. Ann Windsor has initiated the termination of only one other secretary within her first week or two of employment. The secretary's termination was due to excessive tardiness and absenteeism. (Plaintiff's Fact 159)

23. When Carol Howitt approved the decision to terminate plaintiff's employment, she was unaware of

plaintiff's alleged disabilities. (Defendant's Fact #22)

24. Don Russell reviews an employee's personnel file prior to that employee being terminated. (Plaintiff's Fact 162)

25. Adam's Mark terminated plaintiff's employment on May 17, 1995. (Defendant's Fact 117)

26. When notified of her termination by Don Russell, Director of Human Resources, plaintiff made no mention of her alleged disabilities. (Defendant's Fact #27)

27. After defendant terminated plaintiff, defendant recorded in plaintiff's personnel file that she was not eligible for re-hire. (Undisputed Portion of Plaintiff's Fact 163)

28. Defendant has followed its progressive discipline procedures with other secretaries and has

worked with secretaries with performance problems rather than terminate them, in an attempt to salvage their employment. (Plaintiff's Fact 165)

29. Plaintiff filed a charge of discrimination against Adam's Mark with the Equal Employment Opportunity Commission on June 14, 1995, Charge No. 281 95 1390, alleging she was terminated by Adam's Mark because of her alleged disabilities. (Defendant's Fact 135)

30. Plaintiff was involved in an automobile accident in approximately June 1995. A driver of another automobile, which driver was not employed by Adam's Mark, approached plaintiff's car from the rear and collided with plaintiff's car while plaintiff was attempting a left-hand turn. (Defendant's Fact 147)

31. In August 1995, plaintiff became employed by

Tyrell Corporation as a computer technician. (Defendant's Fact 129)

32. After plaintiff was terminated by defendant, she was extremely distraught and began to hear "voices" for the first time. Despite obtaining new employment, plaintiff suffered a bipolar breakdown. (Plaintiff's Fact 166).

33. Plaintiff's August 1995 mental breakdown resulted in her loss of employment at Tyrell Corporation. (Defendant's Fact 132)

34. Without medication for her bipolar disorder, plaintiff suffers from memory loss, inability to sleep, lack of concentration, paranoia and delusional thinking. Furthermore, plaintiff is unable to function, think or care for herself. (Plaintiff's Fact 167)

35. When taking her medication as prescribed, plaintiff suffers from short-term memory loss and acts

combative, resistive or resentful toward others. (Plaintiff's Fact 169)

36. When plaintiff takes her medication, her disability does not prevent her from performing any particular jobs other than her former job at the Federal Emergency Management Agency and a job such as an airline pilot. (Defendant's Fact 113; Plaintiff's Fact 113)

37. A copy of the Notice of Right to Sue issued to plaintiff was mailed to Adam's Mark's corporate office in St. Louis, Missouri on September 29, 1995. (Defendant's Fact 138)

38. Adam's Mark received a copy of the Notice of Right to Sue in St. Louis on October 3, 1995. (Defendant's Fact 139)

39. The EEOC mailed the Notice of Right to Sue to plaintiff's correct address. (Defendant's Fact 140)

40. Plaintiff received the Notice of Right to Sue mailed to her by the EEOC. (Defendant's Fact 141)

41. Plaintiff met with her attorney and provided her attorney with the Notice of Right to Sue within several days of her receipt of the Notice of Right to Sue. (Defendant's Fact 145)

42. Plaintiff filed her complaint on January 3, 1996. (Defendant's Fact 146)

III. DISCUSSION

A. The Timely Filing Of Plaintiff's Complaint

The procedures of Title VII, specifically section 2000e-5, are applicable to actions brought under the Americans With Disabilities Act of 1990 ("ADA"). *See* 42 U.S.C. S 12117(a); *McSherry v. Trans World Airlines, Inc.*, 81 F.3d 739, 740 n. 3 (8th Cir. 1996) ; *Muth v. Cobro Corp.*, 895 F. Supp. 2,54, 255 (E.D. Mo. 1995). Before a plaintiff may file an ADA suit, she must file a timely charge of

discrimination with the Equal Employment Opportunity Commission ("EEOC") and receive a right to sue letter. *See McSherry*, 81 F.3d at 740 n.3; *Boley v. Commercial Carriers, Inc.*, 1996 WL 118280, *8 (E.D. Mo. Feb. 23, 1996). The complainant has ninety days after receipt of the right to sue notice to bring a civil action in district court. *See* 42 U.S.C. S 2000e-5(f) (1) ; *Dunham v. City of O'Fallon*, 945 F. Supp. 1256, 1260 (E.D. Mo. 1996).

1. The Parties' Positions

Defendant argues that it is entitled to summary judgment on Count One of plaintiff's complaint because the complaint was not timely filed within ninety days of receipt of a notice of right to sue from the EEOC. (Defendant's Memorandum at 9) Specifically, defendant asserts that the EEOC mailed the Notice of Right to Sue to plaintiff on September 29, 1995. (*Id.* at 10) Defendant states that plaintiff testified in her deposition that. She did not know the

date she received the Notice of Right to Sue and that she made no record of the date of receipt. (*Id.*) Defendant contends that pursuant to Rule 6(e), Federal Rules of Civil Procedure, plaintiff is presumed to have received the Notice within three days of the date of mailing by the EEOC. (*Id.*) Therefore, according to defendant, plaintiff's complaint, filed on January 3, 1996, was untimely and must be dismissed. (*Id.*)

Plaintiff argues that actual, as opposed to presumptive, receipt of the Notice of Right to Sue commences the running of the ninety day limitations period and that plaintiff actually received her Notice on October 6, 1995. (Plaintiff's Suggestions in opposition at 13) Plaintiff claims that although she could not give the date of receipt from memory during her deposition, she recorded the date of receipt on the envelope in which the Notice was delivered. (Id. at 14) Plaintiff states she then delivered the Notice along with the

envelope to her attorney who recorded the deadline for filing as January 4, 1996, ninety days after October 6, 1995. (*Id.*) Plaintiff submitted an Affidavit which states: (1) she received the Dismissal and Notice of Rights on October 6, 1995; (2) that immediately upon receiving the Dismissal and Notice of Rights, she recorded the date of receipt in red ink on the back of the Dismissal and Notice of Rights; and (3) that approximately one and one-half to two weeks after receipt, she hand-delivered the Dismissal and Notice of Rights to her attorney. (*Id.* at Ex. I) A copy of the front and back of the Dismissal and Notice of Rights with "received 10/6/95" hand-written on the back was attached to plaintiff's Affidavit. (*Id.*)

In reply, defendant argues that plaintiff cannot escape summary judgment by submitting an affidavit which contradicts her sworn deposition testimony. (Defendant's Reply Memorandum at 7) At her deposition, plaintiff could not remember the date on which she received the Notice and

when asked: "Did you make any kind of record or keep any record of the date you received the Notice of Right to Sue," plaintiff responded: "No." (*Id.* at 5-6) Although plaintiff reviewed the deposition transcript and made changes to some of her answers, she did not change her answers to the questions regarding receipt of the notice. (*Id.* at 5-7)

Plaintiff filed a Supplemental Memorandum in opposition to Defendant's Motion for Summary Judgment and attached an Affidavit given by her attorney and a copy of the envelope in which the Notice was mailed to plaintiff. The Affidavit of plaintiff's attorney, David W. White, provides: (1) that plaintiff's case file has been maintained in Mr. White's care, custody and control since it was opened; (2) that on or about October 17, 1995, Mr. White met with plaintiff and plaintiff gave Mr. White the Right to Sue letter she had received by certified mail from the EEOC and the envelope that the letter came in; and (3) that the letter and envelope

have been maintained in the case file since then and their condition and contents have not been altered. (Plaintiff's Supplemental Opposition at Ex. K) The front of the envelope contained a handwritten notation of "recd 10/6/95" and a check mark next to "10-5."

2. Analysis

Rule 6 (e) states a presumption that mail is received within three days of mailing. That presumption can be rebutted with proof of a different actual receipt date. *See Stambaugh v. Kansas Dep't of Corrections*, 844 F. Supp. 1431, 1434 n.4 (D. Kan. 1994). In *Smith v. Medical Enterprises, Ltd.*, 1996 WL 137502 (E.D. La. March 25, 1996), the court was confronted with an issue similar to the issue before this Court. In *Smith*, the defendants filed a motion for summary judgment contending that the plaintiff is presumed to have received the right to sue notice three days after it was mailed by the EEOC, in that case, on November

25, 1994. The court stated:

> However, plaintiff has produced the return receipt from the EEOC, which sent the letter to Smith by certified mail. The date stamped on that receipt is November 29, 1994. Defendants argue that plaintiff is presumed to receive a mailed notice three (3) days after mailing. In this regard, defendants rely on Baldwin County Welcome Center v. Brown, 466 U.S. 147 . . . (1984), and on Rule 6(e) of the Federal Rules of Civil Procedure.
>
> This argument is unpersuasive for two reasons. First, in summary judgment, the non-movant's well-plead facts, particularly when supported by extrinsic evidence, are accepted as true. Plaintiff shows evidence that the date of receipt was November 29. Defendants have not rebutted that evidence with any other evidence or affidavit.

Secondly, *Baldwin County*, while covering a very similar factual situation, does not go to the point in question. Defendants refer to a cursory footnote in the opinion that relies on Rule 6(e). *Baldwin*, 104 S.Ct. at 1724 n.1. Rule 6(e), at least on its face, purports to extend, not limit, the time in which a party receiving notice by mail may have in order to respond to that mailed notice. The court in *Baldwin* was not faced with the issue squarely, but instead was ruling on the question of whether a right to sue notice itself, if filed with a district court within 90 days, can be considered the complaint for purposes of S 2000e-5(1). No facts were discussed in *Baldwin* which can equate that situation with the one at hand. One can assume that in *Baldwin*, the court had no evidence to rebut the "presumption" of Rule 6(e) that the mailed notice was received within three days of its mailing.

In the instant case, the return receipt, which is stamped at the latest on the day of delivery, is enough evidence to rebut any presumption to the contrary.

Accordingly, the defendants' motion for summary judgment as to this ground must be denied. *Smith v. Medical Enterprises, Ltd.*, 1996 WL 137502, *3 (E.D. La. March 25, 1996).

Defendant relies on *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361 (8th Cir. 1983), for its argument that plaintiff not be allowed to escape summary judgment by submitting an affidavit which contradicts her sworn deposition testimony. (Defendant's Reply Memorandum at 7) However, *Camfield Tires* provides that a contradictory affidavit can be appropriate in opposing a motion for summary judgment when circumstances such as confusion or mistake explain why an affidavit directly contradicts deposition testimony. *See Camfield Tires*, 719 F.2d at 1364-

65. The *Camfield Tires* court further stated, "only in circumstances . . . where the conflicts between the deposition and affidavit raise only sham issues should summary judgment be granted." *Id.* at 1366.

Contrary to defendant's position, the Court does not believe that plaintiff is merely attempting to raise a sham issue for the purpose of escaping summary judgment. Immediately prior to testifying that she did not make any record regarding the date she received the Notice of Right to Sue, plaintiff testified: "this is probably the document that I got in the mail, but it's just so late in the day that I'm having a problem with remembering my name." (Plaintiff's Depo. at 107) Further, as set forth in Uncontroverted Fact Nos. 34 and 35, plaintiff suffers from memory loss. Finally, physical evidence (the Notice and envelope with plaintiff's notations of when the Notice was received) supports plaintiff's affidavit.

Plaintiff has presented evidence to rebut the Rule 6(e)

presumption of receipt and has raised a genuine issue of fact as to when she actually received notice of her right to sue. Defendant's motion for summary judgment on the issue that the Complaint was not timely filed must be denied.

B. The Decision Makers' Knowledge of Plaintiff's Alleged Disability

No employer "shall discriminate against a qualified individual with a disability because of" that disability. 42 U.S.C. § 12112 (a). Further, the ADA requires an employer to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee with a disability. *See* 42 U.S.C. SS 12112 (a) and (b) (5) (A) ; 29 C.F.R. S 1630.9; *Miller v. National Cas. Co.*, 61 F.3d 627, 629 (8th Cir. 1995). However, before an employer must make accommodations for the physical or mental limitation of an employee, the employer must have knowledge that such a limitation exists. *See Miller*, 61 F.3d at 629.

Defendant contends that the decision makers with respect to plaintiff's discharge, Ann Windsor, Carol Howitt and Don Russell, were not aware of plaintiff's alleged disability at the time the discharge decision was made. (Defendant's Memorandum at 12). Therefore, no inference of discrimination can be raised and defendant is entitled to summary judgment on Count One of the complaint. (*Id.*)

Plaintiff counters that the evidence in this case gives rise to a strong inference that defendant was aware of plaintiff's disability at the time it terminated her employment. (Plaintiff's Suggestions in Opposition at 15) Plaintiff argues that discrimination cases often depend on inferences rather than direct evidence. (*Id.* at 17)

Viewing the facts in the light most favorable to plaintiff, the party opposing the motion for summary judgment, and giving plaintiff the benefit of any inferences that logically can be drawn from those facts, the Court finds

that plaintiff apprised defendant of the fact that she suffered from a mental impairment. On the Supplemental Information Form which plaintiff was given to complete during orientation, plaintiff disclosed that she has had a bipolar breakdown and has been hospitalized for bipolar disfunction since the age of seventeen. (Uncontroverted Fact Nos. 9-10) At the conclusion of orientation, plaintiff's Supplemental Information Form was placed in her personnel file to which supervisors have access. (Uncontroverted Fact No. 11)

Ms. Windsor, plaintiff's immediate supervisor and the person who made the initial decision that plaintiff should be terminated, reviewed plaintiffs personnel file after plaintiff completed orientation and before she was terminated. (Uncontroverted Fact No. 20; Plaintiff's Fact No. 52) Defendant disputed Plaintiff's Fact No. 52 arguing: "Burns did not recall if, in fact, Windsor requested the file. Burns Deposition, 36:1-25." However, the Court has reviewed page

36 of Ms. Burns' deposition and it appears that Ms. Burns stated she could not remember two things: (1) whether Ms. Windsor came to her and requested plaintiff's personnel file or whether Burns was just aware that Windsor had reviewed the file; and (2) whether anyone had come to Ms. Burns specifically to discuss plaintiff's performance. Ms. Burns did not state that she could not recall whether Ms. Windsor requested plaintiff's file. Rather, Ms. Burns stated she had a specific recollection that Ms. Windsor reviewed plaintiff's folder:

Q. Do you have any specific recollection whether or not anyone who was a supervisor of Ms. Christopher reviewed her folder?

A. Yes.

Q. Who?

A. Ann Windsor.

Q. And when within the time that Ms. Christopher was

employed did she request or did she look at that folder?

A. I don't know.

Q. Would it have been during her period of employment?

A. Yes.

Q. Would it have been after the orientation session?

A. Yes.

Q. And since she only worked there a few days, that narrows it down quite a bit.

A. Yes.

Q. Do you recall anything specifically about why Ms. Windsor asked to look at her personnel file?

A. I think she was questioning her computer skills.

Q. And did she come to you and request the personnel file or were you just aware that she did?

A. I don't remember.

(Patricia Burns Depo. at 35-36)

Ann Windsor recommended to Carol Howitt and Don Russell that plaintiff be terminated. (Uncontroverted Fact No. 21) Don Russell reviews an employee's personnel file prior to that employee being terminated. (Uncontroverted Fact No. 24) Given that both Ann Windsor and Don Russell reviewed plaintiff's personnel file prior to her termination and the fact that plaintiff's Supplemental Information Form was in her personnel file, an inference can logically be drawn that these decision makers read that plaintiff had suffered a bipolar breakdown and that she had been hospitalized for bipolar disfunction since the age of seventeen.

Plaintiff has raised a genuine issue of fact as to whether the decision makers with respect to plaintiffs discharge were aware of plaintiff's alleged disability at the time the discharge decision was made. Defendant's motion for summary judgment on this issue must be denied.

C. The Prima Facie Case

To establish a prima facie case under the ADA, a plaintiff must show: (1) that she was a disabled person within the meaning of the ADA; (2) that she was qualified to perform the essential functions of the job with or without reasonable accommodation; and (3) that she suffered an adverse employment under circumstances giving rise to an inference of unlawful discrimination. *See Miners v. Cargill Communications, Inc.*, 1997 WL 232265, *3 (8th Cir. May 9, 1997) ; *Webb v. Mercy Hosp.* , 102 F.3d 958, 959-60 (8th Cir. 1996) ; *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995).

1. Disabled Within The Meaning Of The ADA

The Court's analysis of whether plaintiff has established a prima facie case begins with an evaluation of whether plaintiff has shown that she is a disabled person

within the meaning of the ADA. The ADA defines "disability" as follows:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B)a record of such an impairment; or
>
> (C)being regarded as having such an impairment

42 U.S.C. § 12102(2).

The parties dispute whether plaintiff disability which would be covered by the ADA. It is undisputed that plaintiff has a bipolar disorder which has resulted in numerous hospitalizations over the years and plaintiff argues that this is enough to qualify her as disabled under the ADA. Defendant argues that plaintiff is not "disabled" because when plaintiff takes her medication as prescribed, she is not substantially limited in any major life activities within the meaning of the

ADA. (Defendant's Memorandum at 16) A "major life activity" includes "functions such as caring for oneself, performing manual tasks, walking,seeing, hearing,speaking, breathing,learning, and working." 29 C.F.R. S 1630.2(i).

This dispute between the parties raises various issues. Defendant relies on cases which hold that a disorder should only be looked at in its medicated or corrected condition. *See Ellison v.Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996) (breast cancer successfully treated not a "disability"); *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), cert. denied, 511 U.S. 10110 (1994) (corrected vision not a disability); *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437 (W.D. Wis. 1996) (diabetic not "disabled"where condition controlled with insulin) ; *Coghlan v.H.J. Heinz Co.*, 851 F. Supp. 808 (N.D. Tex. 1994) (same).

Other courts have held that mental impairments are protected disabilities regardless of medication. For example,

in *Krocka v. Riegler*, 1997 WL 137173 (N.D. Ill. March 21, 1997), the court found:

> The fact that Krocka alleges that he is able to perform his duties as a police officer as long as he takes Prozac does not imply that he does not suffer a substantial impairment of a major life activity; therefore, it does not mean that he is not "disabled" within the meaning of the ADA. The condition at issue is to be considered "without regard to mitigating measures such as medicine." Interpretive Appendix § 1630.2(h). Therefore, defendants' focus on plaintiff's performance when he is taking medication is improper. Any mental or psychological disorder, including emotional or mental illness, is considered a "mental impairment" under the ADA. 29 C.F.R. S 1630.2 (h) (2). . . .
>
> * * *

> . . . . According to the complaint, Krocka's depression does substantially limit a major life activity. Krocka stated that without Prozac, his ability to get out of bed--and as a result to work and to care for himself--is substantially limited by his depression. . . . At this stage, the court cannot find that the allegations in the complaint preclude a finding that Krocka suffers from a mental impairment that substantially limits a major life activity and qualifies as a "disability" for purposes of the ADA.

Krocka, 1997 WL 137173 at *7-8 (footnote omitted). In *Liff v. Secretary of Transp.*, 1994 WL 579912 (D.D.C. Sept. 22, 1994), adopted by 1995 WL 231246 (D.D.C. Feb. 21, 1995), the court found:

> It is undisputed that plaintiff suffers from chronic, major depression of longstanding duration. Defendant maintains that because plaintiff's

depression is generally controlled by medication, her impairment does not substantially limit any of her major life activities. however. it is evident that Congress intended that the determination of whether an impairment substantially limits a major life activity is to be made without regard to medication:

> The existence of an impairment is to be determined without regard to mitigating measures such as medicines[.] * * * For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine.

See 56 Fed. Reg. 35740-41 (July 26, 1991).

* * *

Plaintiff can also establish that she is handicapped within the meaning of the second alternative

definition in that she can demonstrate "a record of such impairment." Defendant maintains that because plaintiff's depression did not substantially limit her major life activities, she cannot show a record of such an impairment. However, the undersigned finds no support for defendant's narrow reading of the second alternative definition, since

> [a] person with a record of impairment can still qualify as a handicapped individual even if that individual's impairment does not presently limit one or more of that person's major life activities. Thus, for example, a person who has recovered from a history of mental or emotional illness, heart disease, or cancer may always be a handicapped individual under the statute.

Nathanson v. Medical College of Pennsylvania, 926

F.2d 1368, 1382 (3d Cir. 1991) . . .

Liff, 1994 WL 579912 at *3-4 (citations to record and footnote omitted).

However, putting aside whether an impairment should be viewed in its medicated condition to determine whether it constitutes a disability, it appears there is a question of fact as to whether plaintiff's impairment, even with medication, limited her major life activities. *See Equal Employment Opportunity Comm'n v. Union Carbide Chems. & Plastics Co.*, 1995 WL 495910 *2 (E.D. La. Aug. 18, 1995) ("Assuming arguendo, that Mr. Keller's disorder should be looked at in light of his medicated condition this still leaves the question of whether his medicated condition constitutes a disability under the ADA"); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 814 (N.D. Tex. 1994) (where plaintiff presented evidence that even with insulin, diabetes continues to affect such major life activities as eating and sleeping, summary

judgment is inappropriate).

It is undisputed that since the age of nineteen, plaintiff has experienced several breakdowns, the most recent occurring in October 1996. (Uncontroverted Fact No. 1) Without medication for her bipolar disorder, plaintiff suffers from memory loss, inability to sleep, lack of concentration, paranoia and delusional thinking. Furthermore, plaintiff is unable to function, think or care for herself. (Uncontroverted Fact No. 34) Plaintiff further claims that she suffers bipolar breakdowns requiring hospitalization even while taking her prescribed medicine. (Plaintiff's Opposition to Defendant's Fact No. 11; Plaintiff's Fact No. 68)

A genuine issue of material fact exists with respect to whether plaintiff is "disabled" within the meaning of the ADA. Regardless of plaintiff's medication, whether plaintiff is impaired in a major life activity is a question of fact not properly decided on summary judgment. *See Equal*

Employment Opportunity Comm'n v. Union carbide Chems. & Plastics Co., 1995 WL 495910 *2 (E.D. La. Aug. 18, 1995) Furthermore, the extent of plaintiff's mental impairment and the effectiveness of her medication in controlling it represent some of the other issues which are only properly decided at trial. *Id.* Accordingly, summary judgment on this issue is precluded.

2. Qualified To Perform Essential Functions Of Job

In continuing its analysis of whether plaintiff has established a prima facie case, the Court would ordinarily evaluate the second element of a prima facie case under the ADA, i.e. whether plaintiff was qualified to perform the essential functions of the job with or without reasonable accommodation.

Plaintiff contends that she was qualified to perform the essential functions of the secretarial job at Adam's Mark.

(Plaintiff's Complaint at ¶¶ 22-23) While the Court would have expected defendant to argue in its Motion for Summary Judgment that plaintiff was not qualified for the position, defendant did not raise this issue in its briefing. Therefore, the Court will proceed to the third element of a prima facie case.

3. Suffered Adverse Employment Action Under Circumstances Giving Rise To An Inference Of Unlawful Discrimination

In concluding its analysis of whether plaintiff has established a prima facie case, the Court must evaluate the third element of a prima facie case under the ADA, i.e. whether plaintiff suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination.

Plaintiff contends that defendant terminated her

employment due to her mental disability. (Plaintiff's Complaint at ¶ 21) Plaintiff argues that she can present sufficient evidence to create an inference that her disability was a motivating factor in defendant's decision to terminate her. (Plaintiff's Suggestions in Opposition at 21)

Again, while the Court would have expected defendant to argue in its Motion for Summary Judgment that plaintiff did not meet the third element of a prima facie case, defendant did not specifically raise this issue in its briefing. Instead, defendant argued that plaintiff cannot identify any similarly-situated, nondisabled employees treated more favorably than plaintiff. (Defendant's Memorandum at 18)[1]

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[1]Defendant cites a race discrimination case and an age discrimination case for the proposition that in the absence of any evidence that similarly-situated, nondisabled employees were treated more favorably than plaintiff, plaintiff cannot prevail on her disability discrimination claim. (*Id.*) The Court believes defendant has confused the elements of a prima facie case of race or age discrimination with the

While inferences of discrimination are commonly raised by showing that the plaintiff was treated less favorably than similarly situated employees who are not in the plaintiff's protected class, this is not the only means of demonstrating unlawful discrimination. *See Miners v. Cargill Communications. Inc.*, 1997 WL 232265, n.7 (8th Cir. May 9, 1997) ("Neither congressional mandate nor judicial precedent requires evidence of disparate impact to show discrimination under the ADA. *See* 42 U.S.C. S 12111 (no requirement that an employee must show disparate impact)").

Given the manner in which the issues have been presented to the Court in the Motion for Summary Judgment, the Court will assume that plaintiff can make a prima facie showing of ADA discrimination.

D. Defendant's Articulated Reasons For

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elements set forth by the Eighth Circuit Court of Appeals for a discrimination case under the ADA.

Plaintiff's Discharge

If a prima facie case is established, the defendant may rebut the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for its actions. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Miners v. Cargill Communications. Inc.*, 1997 WL 232265, *3 (8th Cir. May 9, 1997). If the employer is successful, the burden shifts back to the employee to show that the employer's proffered reasons are a pretext for discrimination. *See St. Mary's-Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993); *Miners v. Cargill Communications, Inc.*, 1997 WL 232265, *3 (8th Cir. May 9, 1997).

Defendant's articulated reasons for plaintiff's discharge are that plaintiff's direct supervisor believed that plaintiff lacked the skills she represented on her resume and that plaintiff was unable or unwilling to learn the duties of her job. (Defendant's Memorandum at 18) Defendant states:

> Ann Windsor, Plaintiff 's immediate supervisor, made the initial decision that Plaintiff should be terminated, based upon her belief that Plaintiff had exaggerated her word processing abilities on her application, resume, and during her interview; based upon her belief that Plaintiff demonstrated a lack of word processing abilities; and based upon Plaintiff's uncooperative attitude and apparent unwillingness to learn the duties of her position. (Windsor Deposition, pp. 54-55, 60-63)

(Defendant's Fact No. 19) Defendant also notes that plaintiff admitted she acted combative, resentful and resistant towards her supervisor and co-workers. (Defendant's Memorandum at 18; Defendant's Fact No. 15).[2] The Court finds that

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[2]Plaintiff controverted Defendant's Fact No. 15 as follows: "Plaintiff testified that she made a combative expression at Ann Windsor, Lisa Lambertson and another secretary, and may have seemed combative toward Lisa Lambertson. Plaintiff does not

defendant has rebutted the presumption of discrimination by articulating legitimate, nondiscriminatory reasons for the discharge.

Since defendant has articulated legitimate, nondiscriminatory reasons for the discharge, the burden shifts back to plaintiff to show that her employer's proffered reasons are a pretext for discrimination. "(A) reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). The Eighth Circuit has recently held:

> We believe that Hicks allows a trial judge to decide on a motion for summary judgment that the evidence is insufficient for a reasonable trier of fact to infer discrimination even though the

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testify that she was resentful or resistive toward them. (Plaintiff's Opposition to Defendant's Fact No. 15)

> plaintiff may have created a factual dispute as to the issue of pretext. Intentional discrimination vel non is like any other ultimate question of fact: either the evidence is sufficient to support a finding that the fact has been proven, or it is not.

Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1335 (8th Cir. 1996). See also *Kramer v. K & S Assocs.*, 942 F. Supp. 444, 448 (E.D. Mo. 1996) (applying the *Rothmeier* analysis to the ADA context).

Plaintiff makes several arguments that defendant's proffered reasons are pretextual. First, plaintiff alleges that Ann Windsor admitted that it normally takes three weeks to train a new secretary, but that plaintiff worked for less than four days when she was fired. (Plaintiff's Suggestions in Opposition at 21) The Court has reviewed Ms. Windsor's testimony and finds that while Ms. Windsor said it generally takes about three weeks for a new secretary to fully

understand the company's paperwork routing procedures and to work independently, new secretaries are expected to be proficient in word processing skills when they start work. (Ann Windsor Depo. at 29-30) Ms. Windsor further testified that when she hired plaintiff, plaintiff indicated that she had extensive word processing experience, up to and including programming. (*Id.* at 54) However, through Ms. Windsor's observations of plaintiff and through "sitting down with her," Ms. Windsor determined that plaintiff was not demonstrating the skills she claimed to possess. (*Id*) Ms. Windsor testified that there was a grid on the top of the terminals showing how to use each one of the comm nd keys and that Ms. Christopher was not familiar with the use of these command keys. (*Id.* at 54) According to Ms Windsor, Ms. Christopher did not work in any other area other than trying to learn the basic form usage on the computer. (*Id.* at 55) She did not do routing. (*Id.*) At one point, Ms. Windsor pulled up a blank

form for Ms. Christopher to work on in her presence. Ms. Christopher advised Ms. Windsor the form was difficult to use and that one of her first priorities would be to change the office system. (*Id.* at 61) Ms. Lambertson testified that Ms. Christopher told her she was not familiar with the function keys. (Lisa Lambertson Depo. at 26) Ms. Lambertson also observed that Ms. Christopher struggled getting into a document, trying to save the document and getting out of the document, especially at the end of the day. (*Id.* at 27)

Given the foregoing, the Court does not accept, nor does it believe any reasonable jury would accept, plaintiff's argument that because she worked for less than four days when she was fired and defendant has admitted it normally takes three weeks to train a new secretary in the company's routing procedures, she has shown pretext on defendant's part.

Plaintiff's second argument that defendant's proffered reasons for plaintiff's discharge are pretextual is that other

secretaries had started work in defendant's office with little or no prior computer or word processing experience, that these inexperienced secretaries were afforded training and that plaintiff was not given the same opportunity to succeed. (Plaintiff's Suggestions in Opposition at 22) The Court has reviewed the cited testimony of Patricia Burns and Lisa Lambertson. Ms. Burns testified that the person she was replacing sat beside her and trained her for "a few days." (Patricia Burns Depo. at 48) Ms. Lambertson testified that she used a Word Perfect tutorial at Adam's Mark as a refresher and that Ms. Burns and Ms. Windsor helped her when she needed it. (Lisa Lambertson Depo. at 14-17) Ms. Lambertson further testified that she helped secretaries hired after her. (*Id.* at 17)

Contrary to plaintiff's argument, the evidence suggests that just as it had done with secretaries before plaintiff, defendant had the person plaintiff was replacing, Lisa

Lambertson, sit beside plaintiff and train her. Plaintiff testified that Ms. Lambertson trained her to do the job. (Plaintiff's Depo. at 160) Ms. Lambertson testified that she tried to teach Ms. Christopher so that Ms. Christopher could "walk into this job." (Lisa Lambertson Depo. at 25) Ms. Lambertson further testified that she would show Ms. Christopher the paperwork and say "okay, start on your own, if you need help, I'm here to help back you up, teach you more." (*Id.* at 38) Also contrary to plaintiff's argument, the evidence suggests that tutorials and computer manuals were available to plaintiff. For example, Ms. Windsor testified that she suggested to Ms. Christopher that she might want to look at the computer manuals. (Ann Windsor Depo. at 63) Ms. Lambertson advised Ms. Christopher of the template above the function keys explaining their usage and told her they had the tutorial as well. (Lisa Lambertson Depo. at 26) Even plaintiff testified that she looked in the manual to remember

how to merge a document. (Plaintiff's Depo. at 52)

The Court does not believe that sufficient evidence has been presented to allow a jury to find that plaintiff was trained differently than similarly situated employees who are not in plaintiff's protected class or that plaintiff was not afforded the same opportunities to succeed as other employees. Plaintiff has not proved pretext with her second argument.

Plaintiff's third argument that defendant's proffered reasons for plaintiff's discharge are pretextual is that defendant admitted that it has "worked with" other secretaries with performance problems rather than terminate them in an attempt to salvage their employment, but no one even indicated to plaintiff that there were concerns with her performance until her termination. (Plaintiff's Suggestions in Opposition at 22) The Court has reviewed the cited testimony of Don Russell and finds that Mr. Russell did admit that

defendant "worked with" one secretary in the sales department. (Don Russell Depo. at 84) However, that secretary demonstrated a deficiency in routing, rather than technical word processing skills. (*Id.* at 91) Further, the secretary that defendant "worked with" showed a commitment to learn and to improve, something plaintiff failed to show. (*Id.* at 84, 91, 101)

The Court does not accept, nor does it believe any reasonable jury would accept, plaintiff's argument that because defendant "worked with" a secretary who demonstrated a deficiency in routing defendant's paperwork, she has shown pretext on defendant's part.

Finally, plaintiff argues that she could not be terminated for acting combative, resentful and resistant toward others because these mannerisms are attributable to her disability. (Plaintiff's Suggestions in Opposition at 22) Plaintiff cites *Hogarth v. Thornburgh*, 833 F. Supp. 1077,

1085 (S.D.N.Y. 1993), for this proposition. The *Hogarth* court found that if an employee is terminated for conduct which is caused by the employee's handicap, the proper inquiry is whether, given this handicap, the employee is qualified for the position. *Id.* at 1084-85. Defendant's articulated reason for discharging plaintiff was that she had an uncooperative attitude and an apparent unwillingness to learn the duties of her job. Ms. Windsor testified that when Ms. Christopher was being told the procedures for setting up a file, instead of listening, she advised Ms. Windsor how she would change the file system. (Ann Windsor Depo. at 87) Ms. Windsor further testified:

> Cheryl did not seem to want to learn the procedures so in trying to show her the procedures, she did not physically complete anything herself. She allowed Lisa to do it for her even though Lisa tried showing her. For

instance, on file setup she basically turned it over to her to complete.

(*Id.* at 88) Plaintiff testified that on the first or second day that she worked with Ms. Lambertson, she told Ms. Lambertson that she wanted to change the programs, even though she had not yet learned everything she needed to know about the job. (Plaintiff's Depo. at 50) Plaintiff further testified that she "probably seemed to be combative." (*Id.* at 49) An employee who is unwilling to learn the duties of her job can hardly be considered qualified for the position.

The Court concludes that plaintiff's evidence is insufficient to raise a genuine issue of fact as to pretext or intentional discrimination. Therefore, defendant is entitled to summary judgment on plaintiff's claim of discrimination under the ADA.

E. Mitigation Of Damages

Given the Court's finding above that summary

judgment is appropriate on plaintiff's ADA claim, it need not reach defendant's argument regarding mitigation of damages.

F. Plaintiff's State Law Claims

Because the Court finds that defendant is entitled to summary judgment on plaintiff's claim under the ADA, the basis for federal jurisdiction no longer exists. The Court declines to exercise supplemental jurisdiction over plaintiff's state law claims. Therefore, plaintiff's state law claims of intentional infliction of emotional distress and negligent infliction of emotional distress are dismissed without prejudice.

IV. CONCLUSION

Based on the foregoing, it is

ORDERED that Defendant's Motion for Summary Judgment (doc #32) is granted.

/s/Sarah W. Hays
SARAH W. HAYS
UNITED STATES MAGISTRATE JUDGE

Date: /s/ June 3, 1997
Kansas City, Missouri

Supreme Court, U.S.
FILED
JUL 20 1998
OFFICE OF THE CLERK

No. 97-1973

In The

Supreme Court of the United States

October Term, 1997

CHERYL D. CHRISTOPHER,

Petitioner,

vs.

ADAM'S MARK HOTELS, a Division of HBE Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eight Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITIONER'S QUESTIONS PRESENTED

The questions presented by Petitioner do not accurately reflect the issues in this case. Specifically, Petitioner overstates the issues in hopes of creating some reason for this Court to grant review. Concisely stated, the only issue properly raised in this case is as follows:

I. Whether the Eighth Circuit articulated and applied the appropriate legal standard in determining that Petitioner's evidence was insufficient to survive a motion for summary judgment.

STATEMENT PURSUANT TO RULE 29.6

HBE Corporation is the parent company of Respondent and Respondent has no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

A. Nature of the Case and Procedural Background

Petitioner Cheryl Christopher ("Christopher") sued Respondent Adam's Mark Hotels ("Adam's Mark") seeking damages for employment discrimination in violation of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.* Adam's Mark moved for summary judgment asserting, *inter alia,* that Christopher was discharged for legitimate, nondiscriminatory reasons. The District Court found that Adam's Mark proffered a legitimate, nondiscriminatory reason for Christopher's discharge, and concluded that Christopher's evidence was insufficient to raise a genuine issue of fact as to pretext or intentional discrimination. On March 5, 1998 the District Court entered its Order granting summary judgment in favor of Adam's Mark on Christopher's discrimination claim.

Christopher appealed to the Eighth Circuit, and the Court of Appeals affirmed summary judgment in favor of Adam's Mark. The Eighth Circuit reviewed *de novo* the District Court's decision to grant summary judgment, found that Christopher had failed to create a submissible case of pretext, and agreed with the District Court that Christopher's evidence was insufficient for a reasonable trier of fact to infer discrimination. Christopher now attempts to appeal from the Eighth Circuit's decision affirming the order of the District Court granting summary judgment in favor of Adam's Mark.

B. Statement of Facts

Christopher applied for a sales secretary position at Adam's Mark in Kansas City, Missouri on May 10, 1995. She submitted a resume and employment application indicating that she

possessed a Master's Degree in Computer Science, that she was highly skilled and experienced in the use of Wordperfect (the word processing program utilized at Adam's Mark), and that she had taught Wordperfect at the college level. Christopher was interviewed the same day she applied but did not identify herself as an individual with a disability at the time. She was hired that day for the position.

Christopher reported for work the next day, May 11, 1995. Christopher took part in Adam's Mark's orientation program, at which she was asked to complete several forms. One of the forms was a Supplemental Information Form, which contained questions about medical condition and history. In response, Christopher wrote that she had experienced a bipolar breakdown and that she had been hospitalized for bipolar dysfunction. The supplemental form was placed in Christopher's personnel file in accordance with company procedures.

After orientation, Christopher reported to the sales department where she began on-the-job training with Lisa Lambertson, the sales secretary Christopher was to replace. The training was to consist of Lambertson working side-by-side with Christopher, providing computer instruction. This was the same training received by previous secretaries. In addition, Lambertson told Christopher that Wordperfect tutorials and computer manuals were available for her use, and reminded Christopher there was a template above the function keys explaining their usage.

On Christopher's first day in the sales office, Christopher admitted to Lambertson that she was not familiar with the Wordperfect function keys. When asked to execute a merge and set up a banner using Wordperfect, Christopher indicated she did not know how to perform these tasks. Christopher struggled with locating and opening documents, saving documents, and

closing documents. At one point during Christopher's training, Ann Windsor, Christopher's immediate supervisor, pulled up a blank form for Christopher to work on. Christopher told Windsor that the form was difficult to use and that one of her first priorities would be to change the office system. Christopher admitted in her deposition that she acted combatively during her brief employment at Adam's Mark.

A few days after Christopher's employment began, Windsor recommended that Christopher be terminated. Some time after Christopher's orientation but before her termination, Windsor reviewed Christopher's personnel file. Based upon Windsor's recommendation, Don Russell, Director of Human Resources, agreed that Christopher should be terminated. It was Russell's practice to review employees' files prior to terminating them. On May 17, 1995, Russell terminated Christopher.

REASONS FOR DENYING THE WRIT

I.

CHRISTOPHER HAS FAILED TO ESTABLISH SUFFICIENT GROUNDS FOR CERTIORARI UNDER THE SUPREME COURT'S RULES.

Christopher has failed to demonstrate that this case is exceptional such that it merits the review of the Supreme Court. Supreme Court Rule 10 states that, "[a] petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 further sets forth those circumstances under which certiorari may be proper. *Id.* Not only has Christopher failed to identify any such circumstances in support of her request for certiorari, she also has failed to set forth any compelling reasons that militate in favor of the granting of certiorari. Indeed, Christopher merely points to a phantom split of authority among the circuit courts of appeals. Accordingly, certiorari must be denied.

A. This Case Does Not Involve a Split of Authority Among the Circuits

Christopher's argument that this case involves a split of authority among the United States courts of appeals is erroneous. Under Supreme Court Rule 10, certiorari may be considered where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

The type of conflict required between circuit courts is a direct conflict regarding a specific issue of law. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1 (1996) (certiorari granted to resolve conflict between several Circuits regarding whether federal courts should recognize a psychotherapist-patient privilege under the federal Rules of Evidence); *Bingler v. Johnson*, 394 U.S. 741, 747-48 (1969) (certiorari granted to resolve conflict between Third Circuit's ruling and ruling by Fifth Circuit regarding validity of a treasury regulation); *United States v. Malloy*, 383 U.S. 627, 630-31 (1966) (certiorari granted to resolve conflict between Seventh Circuit's decision and a previous ruling by the First Circuit regarding whether to exclude from a taxable estate the portion of the trust principal representing accumulated income and order an appropriate refund); *Braxton v. United States*, 500 U.S. 344, 347 (1991) (certiorari granted to resolve conflict between the Fourth Circuit's decision below and that of the Second and Fifth Circuits regarding whether a "stipulation" in a plea agreement must be part of the "quid pro quo" for the government's agreement not to charge a higher offense). This case simply does not present any decision by the Eighth Circuit that is in direct (or even indirect) conflict with any other circuit on the specific issues involved.

1. *The Eighth Circuit Articulated And Applied The Proper Standard In Determining That Christopher's Evidence Was Insufficient For A Reasonable Trier Of Fact To Infer Discrimination.*

The standard of review for summary judgment motions is well established. The Federal Rules of Civil Procedure provide that when a party moves for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, show that there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). Any inferences to be drawn from the facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party may not "rest on mere allegations or denials" but must demonstrate on the record the existence specific facts which create a genuine issue for trial. Fed. R. Civ. P. 56(e). Such an issue exists and summary judgment must be denied if on the record then before it the court determines that there will be sufficient evidence for a jury to return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) this Court set forth the analytical framework of burden shifting used by courts to determine whether a plaintiff can establish a claim of employment discrimination based upon circumstantial evidence. First, the plaintiff must establish a *prima facie* case of discrimination. *Id.* at 802. After a plaintiff establishes a *prima facie* case, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for its actions. *Id.* Then, in order to prevail, the plaintiff must show

that the employer's stated reason was in fact pretextual. *Id.* at 804. A showing of pretext requires proof that the employer's articulated reason for the adverse employment action was false, and that discrimination was the real reason. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 515 (1993). The plaintiff retains at all times the burden of persuading the trier of fact that the adverse employment action was motivated by intentional discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981).

This Court, in *St. Mary's Honor Center v. Hicks, supra,* emphasized that once an employment discrimination case reaches the third stage of the *McDonnell Douglas* analytical framework, it is to be treated like any other case. Trial courts or reviewing courts should not "treat discrimination differently from other ultimate questions of fact." *Hicks,* 509 U.S. 502, 524 (quoting *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716). In the third and final stage, a plaintiff must establish the existence of sufficient facts which if proven at trial would permit a jury to conclude that the defendant's proffered reason is pretextual and that intentional discrimination is the true reason for the defendant's actions. *Hicks,* 509 U.S. at 507-508. Thus, at the third stage of the *McDonnell Douglas* analysis, the issue of discrimination can be considered under this Court's standard governing motions for summary judgment. Specifically, summary judgment is proper in a discrimination case when a plaintiff's evidence is insufficient to raise a genuine issue of material fact as to pretext or intentional discrimination.

The Eighth Circuit follows this court's ruling in *Hicks. See Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328, 1334 (8th Cir. 1996) (quoting *Hicks,* 509 U.S. at 515, stating that "a reason cannot be proved to be a '*pretext for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason."). Here, the Eighth Circuit

found that Christopher failed to create a submissible case as to pretext, and "Christopher's evidence is insufficient for a reasonable trier of fact to infer discrimination." [Pet. App. at A-14].[1] As this Court has stated, "[w]here the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial' ", *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), and summary judgment must be granted.

In this case, the Eighth Circuit applied the *McDonnell Douglas* analysis to Christopher's claim. Viewing the evidence in the light most favorable to Christopher, the Court assumed that she had established a *prima facie* case. The Court then shifted the burden to Adam's Mark to articulate legitimate, nondiscriminatory reasons for Christopher's discharge. The Eighth Circuit found that Adam's Mark proffered legitimate, nondiscriminatory reasons for its actions; specifically, that Christopher lacked the skills she represented on her resume; that she was unable or unwilling to learn the duties of her job; and that Christopher was combative, resentful, and resistant towards her supervisors and co-workers. Having found that Adam's Mark rebutted the presumption of discrimination raised by Christopher's *prima facie* case, the Court shifted the burden back to Christopher to demonstrate that Adam's Mark's reasons were a pretext for discrimination. Again, viewing the evidence in the light most favorable to Christopher, the Court found that Christopher's evidence was insufficient for a reasonable trier of fact to infer discrimination. In short, the Eighth Circuit analyzed Christopher's evidence under *McDonnell Douglas*, and found Christopher's evidence insufficient to withstand summary judgment. There is no evidence that in the present case, the Eighth Circuit applied any standard different from those set forth by this Court.

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1. Cites to "Pet. App." refer to the appendix filed with the Petition to this Court.

Christopher argues that by affirming summary judgment in favor of the employer, the Eighth Circuit improperly allowed the trial court to

> weigh the credibility of witnesses and to decide what inferences are reasonable or unreasonable . . . [e]ssentially, the trial judge became the finder of fact in place of the jury.

[Petition at 8]. Christopher essentially argues that summary judgment is improper once a *prima facie* case of discrimination has been established. The Eighth Circuit recognized that a cautionary approach must be taken in examining the propriety of summary judgment in discrimination cases, stating:

> We proceed with caution when deciding whether summary judgment is appropriate en employment cases because intent is usually a central issue. *See Gill v. Reorganized Sch. Dist. R-6, Festus, Mo.*, 32 F.3d 376, 378 (8th Cir. 1994). This cautionary approach, however, "cannot and should not be construed to exempt" from summary judgment employment cases involving intent. *Krenik v. County of Le Sueur*, 47 F.3d 953, 959 (8th Cir. 1995). If there is no genuine issue about the employer's discriminatory intent, to the extent intent is material, then summary judgment may be appropriate.

[Pet. App. at A-6]. The Eighth Circuit recognized that great care must be exercised in granting summary judgment in employment discrimination cases; however, when no genuine issue of material fact exists, summary judgment is appropriate.

The standards for reviewing summary judgment in discrimination cases are well established. When a plaintiff's

evidence is insufficient for a reasonable trier of fact to infer discrimination, summary judgment must be granted. The Eighth Circuit reviewed the evidence in the light most favorable to Christopher, gave her the benefit of all reasonable inferences, and found her evidence insufficient to survive summary judgment. Having failed to produce sufficient evidence to satisfy the District Court and Court of Appeals, Christopher now seeks further review by this Court.

The Eighth Circuit articulated and applied the proper standard in determining that Christopher's evidence was insufficient to withstand summary judgment. Supreme Court Rule 10 states that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. As Justice Stewart once wrote:

> The only remarkable thing about this case is its presence in this Court. For the case involves no more than the application of well-settled principles to a familiar situation, and has little significance except for the [parties].

Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 189 (1973) (dissenting opinion). This admonition is particularly applicable to the present case. This case presents no special or important reason for this Court to accept review.

2. *The Other Circuit Courts Apply The Same Standard As The Eighth Circuit To Summary Judgment In Employment Discrimination Cases.*

Christopher points to cases from other circuits in an attempt to establish a split of authority among the circuits regarding the standard for summary judgment in an employment

discrimination case. However, each of the cases cited by Christopher apply the same standard used by the Eighth Circuit when evaluating the propriety of summary judgment in discrimination cases.

First, Christopher cites to *Aka v. Washington Hospital Center,* 116 F.3d 876 (D.C. Cir. 1997), for the proposition that a majority of the Circuits have adopted a "different standard, which if applied to the facts of the instant case, could well have produced a different result." [Petition at 8]. Initially, Christopher notes that the D.C. Circuit believes an added measure of rigor or caution is appropriate in ruling on summary judgment, because an employer's intent is at issue. The Eighth Circuit does not disagree. The D.C. Circuit's cautionary statement echoes the Eighth Circuit's own statement, articulated by the court below, that

> [w]e proceed with caution when deciding whether summary judgment is appropriate in employment discrimination cases because intent is usually a central issue.

Pet. App. A-6, citing *Gill v. Reorganized Sch. Dist. R-6, Festus, Mo.,* 32 F.2d 376, 378 (8th Cir. 1994). Christopher identifies the "different standard" set forth by the D.C. Circuit as follows:

> . . . the fact finder's disbelief of the reasons put forward by the defendant (particularly if the disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination.

[Petition at 8]. Rather than a different standard applied by the D.C. Circuit, the above language is the frequently quoted language of this Court in *Hicks,* 509 U.S. at 510-11. This is

the same standard articulated and applied by the Eighth Circuit. As Christopher points out, the Eighth Circuit based its opinion on *Rothmeier v. Investment Advisors, Inc.*, 85 F.3d 1328, 1335 (8th Cir. 1996). In reality, the "*Rothmeier* standard" is the Eighth Circuit's straightforward application of *Hicks*. In *Rothmeier*, the Eighth Circuit explains its application of the rule of law stated in *Hicks* as follows:

> The Court thus struck a middle ground in *Hicks*, refusing to adopt either pretext-only or pretext-plus as the exclusive test for sufficiency of evidence in employment-discrimination cases. Instead, the test fashioned by the Court for the third stage of the *McDonnell Douglas* analysis is more fact sensitive: whether the employee has provided evidence from which a reasonable factfinder could conclude that the employer intentionally discriminated against the employee for a prohibited reason.

Rothmeier, 85 F.3d at 1334, citing *Hicks*, 509 U.S. at 510-11.

Christopher argues that the *Rothmeier* standard *incorrectly* requires a plaintiff to produce sufficient evidence for a jury to disbelieve the reasons proffered by the employer. [Petition at 7-8]. Far from incorrect, this is the explicit requirement stated by this Court in *Hicks*: a discrimination plaintiff must prove both that the employer's articulated reason is false, and that discrimination was the real reason for a challenged employment action. *Hicks*, 509 U.S. at 515. Calling the *Rothmeier* standard a different standard than that applied by other circuits is merely a disingenuous attempt to avoid this Court's decision in *Hicks*. The *Rothmeier* standard is, in fact, the *Hicks* standard.

Next, without discussion,[2] Christopher cites cases from the Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits for the proposition that a split of authority in the Circuits could well have produced a different result if applied to the facts of the present case. [Petition at 8]. First, Christopher cites *Krouse v. American Sterilizer, Inc.*, 126 F.3d 494 (3rd Cir. 1997) in support of this erroneous proposition. However, Christopher's failure to produce sufficient evidence of pretext would have warranted summary judgment in the Third Circuit, as it did in the Eighth Circuit. As the Third Circuit states in *Krouse*:

> In order to survive summary judgment in a pretext case, the plaintiff must produce "sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not the true reasons for the challenged employment action."

126 F.3d at 504, quoting *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1067 (10th Cir. 1996) (en banc). *Krouse*, like *Rothmeier* in the Eighth Circuit, is the Tenth Circuit's application of *Hicks* in the context of summary judgment. 126 F.3d at 501. Applying the analysis of *Krouse* to the present case would not change the result; as in the Eighth Circuit, a discrimination plaintiff in the Tenth Circuit must produce sufficient evidence of discrimination in order to survive summary judgment.

Christopher also cites the Fourth Circuit's decision in *Burns v. AAF-McQuay, Inc.*, 96 F.3d 728 (4th Cir. 1996), in her attempt to establish a split of authority. However, the Fourth Circuit also applies the same standard as the Eighth Circuit in analyzing the propriety of summary judgment in a discrimination case:

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2. Christopher offers no discussion of any of the remaining cases she cites for the proposition that a split of authority exists between the Eighth Circuit and six other circuits. [Petition at 9-11].

> To withstand summary judgment, [a claimant] must produce direct or circumstantial evidence "of a stated purpose to discriminate [on the basis of age] of sufficient probative force to reflect a genuine issue of material fact." *[EEOC v.] Clay Printing*, 955 F.2d [936], 941 (4th Cir. 1992) (quoting *Goldberg v. B. Green & Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1988)).

Burns, 96 F.3d at 732, quoting *Henson v. Liggett Group, Inc.*, 61 F.3d 270, 275 (4th Cir. 1995). Christopher's evidence was insufficient to reflect a genuine issue of material fact as to pretext or discrimination. Under *Burns*, the insufficiency of Christopher's evidence would have mandated summary judgment, had her claim arisen in the Fourth Circuit.

Turning to the Seventh and Ninth Circuits, Christopher cites *O'Connor v. DePaul University*, 123 F.3d 665 (7th Cir. 1997) and *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406 (9th Cir. 1996). Like the Eighth Circuit, the Seventh Circuit holds that a discrimination plaintiff can survive summary judgment only by "producing evidence . . . from which a rational factfinder could infer . . . discrimination." *O'Connor*, 123 F.3d at 670. Similarly, the Ninth Circuit holds that summary judgment is appropriate unless the plaintiff produces "sufficient evidence to raise a genuine issue of fact as to whether [the employer's] proffered reasons were pretextual." *Schnidrig*, 80 F.3d at 1410. Had Christopher's claim arose in the Seventh Circuit, summary judgment would have been mandated under *O'Connor*, had her claim arisen in the Ninth Circuit, summary judgment would have been proper under *Schnidrig*.

The same conclusion results from an examination of the Tenth and Eleventh Circuit cases cited by Christopher. The Tenth Circuit, in *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995) states:

> At the summary judgment stage, it then becomes the plaintiff's burden to show that there is a genuine issue of material fact as to whether the employer's proffered reason for the challenged action is pretextual—i.e. unworthy of belief.

69 F.3d at 451.[3] The Eleventh Circuit In *Jameson v. Arrow Co.*, 75 F.3d 1528 (1996) states:

> In an employment discrimination case, the plaintiff must produce sufficient evidence to support an inference that the defendant employer based its employment decision on an illegal criterion. . . . [T]he function of the court on a summary judgment motion is to determine whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational trier of fact to infer a discriminatory motive. . . .

75 F.3d at 1531, n.1. These standards are no different than the standard applied by the Eighth Circuit. Christopher's evidence was insufficient to raise a genuine issue of material fact as to pretext or intentional discrimination. Summary judgment would have been affirmed in each of these circuits.

Christopher's argument that other circuits apply a different summary judgment standard than the Eighth Circuit applies to employment discrimination cases is erroneous. The Eighth Circuit's finding that Christopher's evidence was insufficient for a reasonable factfinder to infer pretext or intentional discrimination would have resulted in summary judgment in

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3. The *Randle* court repeats the above explanation, in simpler language, stating that "[t]he defendant would also be entitled to summary judgment if plaintiff could not offer evidence tending to show the defendant 's innocent explanation for his employment decision was false." 69 F.3d at 451, n.14.

each of the circuits cited by Christopher. None of the cases cited by Christopher establish a split of authority among the circuit courts.

B. Absent a Split of Authority Among the Circuits, There Exists No Reason For This Court to Grant Christopher's Petition.

In light of Supreme Court Rule 10 and its guidelines for determining where certiorari is appropriate, there is no reason for this court to hear this case absent a split of authority among the circuits. This case presents no split of authority on any issue between the Eighth Circuit and other circuits, nor does it present any important question of federal law that has not been, but should be, settled by this Court. The circuits are uniformly and consistently applying the correct legal standard to determine when summary judgment is proper in employment discrimination cases. This case presents no special or important reason for this Court to accept review under Rule 10.

CONCLUSION

For each of the reasons set forth in Adam's Mark's brief, this Court should deny Christopher's Petition for Writ of Certiorari.

Respectfully submitted,

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